

1 ADMIN. JUDGE SIPPEL: He just said  
2 it.

3 MR. SCHONMAN: I know Lieutenant  
4 Steels is among the individuals who we have  
5 discussed and agreed not to call for cross  
6 examination. She's one of the testimonial  
7 witnesses.

8 The matter about procedures that  
9 police may employ that is not an issue in this  
10 proceeding.

11 ADMIN. JUDGE SIPPEL: Well, it  
12 could on rebuttal. Rebuttal doesn't  
13 necessarily go to the heart of the merits of  
14 the case. Rebuttal may go to just basically  
15 a way of testing the credibility of what  
16 another witness would have; what a main  
17 witness is testifying to. It's not bringing  
18 Police Officer Steele in for purposes of  
19 proving "proving their case." Affirmative  
20 defense.

21 MR. SCHONMAN: Your Honor, we'll  
22 just have to see how it plays out.

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1 ADMIN. JUDGE SIPPEL: All right.

2 MR. SCHONMAN: I believe it's so  
3 tangential to this case that it would  
4 certainly be objectionable but we'll see how  
5 it plays out.

6 ADMIN. JUDGE SIPPEL: That's fine.  
7 That's fair. Okay.

8 Okay. Mr. Lyon, well then what  
9 can we do? Can I give you a date certain as  
10 to what -- well, let me ask. Go back again.

11 MR. LYON: April 7th would work.

12 ADMIN. JUDGE SIPPEL: April 2nd.

13 MR. LYON: 7th.

14 ADMIN. JUDGE SIPPEL: 7th to do  
15 what now? To rebuttal?

16 MR. LYON: To submit any written  
17 rebuttal, etcetera.

18 ADMIN. JUDGE SIPPEL: Now, you --  
19 okay. All right. Now, let me be clear about  
20 that. Because the fact that they're  
21 submitted--

22 MR. LYON: Doesn't mean they'll be

1 admitted.

2 ADMIN. JUDGE SIPPEL: Doesn't mean  
3 they'll be admitted and it doesn't mean that  
4 we're going to treat them at the admission  
5 session.

6 MR. LYON: That's fine, Your  
7 Honor.

8 ADMIN. JUDGE SIPPEL: We may or  
9 may not. I'm not going to rule that out. But  
10 just as a time -- and, in fact, even if we  
11 should treat them at the admission session,  
12 but it would be an entirely different category  
13 because they're not going to be relevant to  
14 the case or received in any way shape or form  
15 except as a proffer until after the close of  
16 the case in chief. And then I can make a  
17 determination of when I need it.

18 I mean, it might make logical  
19 sense on April 7th, but after the actual  
20 hearing it might make no sense.

21 Am I being clear?

22 MR. SCHONMAN: Yes.

1 MR. LYON: I understand, Your  
2 Honor.

3 ADMIN. JUDGE SIPPEL: Okay. April  
4 7th to submit rebuttal and Mr. Schonman let me  
5 as you this too again.

6 And when I say Mr. Schonman it  
7 means both counsel, of course.

8 What about this business of a  
9 video phone? It would something less than  
10 live but something more than telephone cross.

11 MR. SCHONMAN: Are you talking for  
12 rebuttal?

13 ADMIN. JUDGE SIPPEL: To cross  
14 examine on rebuttal.

15 MR. SCHONMAN: We would prefer to  
16 have rebuttal witnesses with the exception of  
17 Dr. Allmon, if there are rebuttal witnesses  
18 at all to appear in person.

19 ADMIN. JUDGE SIPPEL: What would  
20 be the problem with the video phone?

21 MR. SCHONMAN: The problem is that  
22 we think it's more beneficial to have the

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1 individual present here where you can observe  
2 first-hand their demeanor and movements,  
3 facial expressions, body expressions in the  
4 courtroom. These are individuals we have not  
5 seen, not spoken to at all.

6 MR. LYON: Your Honor, other than  
7 in the courtroom that would all be available  
8 on the video.

9 ADMIN. JUDGE SIPPEL: Yes. That's  
10 what I was just going to ask. I mean, won't  
11 I be able to do all that except for -- I can't  
12 reach out and touch the person but I can see,  
13 hear, assess?

14 MR. SCHONMAN: Your Honor, let me  
15 say this: We might agree to it, to the video  
16 arrangement once we see what testimony they're  
17 proffering and if Your Honor determines that  
18 rebuttal is even necessary.

19 ADMIN. JUDGE SIPPEL: That's fair.  
20 All right. So, it's open. We'll leave it  
21 open.

22 And one of the reasons I'm very

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1 concerned about trying to get as much as I can  
2 on that and your positions is because we're  
3 going to have to make some inquiries as to  
4 what's available. And I don't want to be  
5 spending time going down a rabbit hole if  
6 we're not going to use it.

7 But I would urge it and something  
8 like rebuttal. Cross examination on rebuttal  
9 in a case of this nature, i.e., being when  
10 you're not dealing with, you know, the top 20  
11 companies or something, that inexhaustible  
12 resources, that this would make sense to me  
13 unless I'm missing something. Okay. Then I  
14 think that's it.

15 Now, what I'm going to do then. I  
16 want to be clear in my own mind. What I'm  
17 going to do. I'm going to issue the order and  
18 the order is going to say that the Bureau is -  
19 - can I same that the Bureau is considering  
20 recasting the testimony of Detective Shilling?  
21 Or you're pretty much resolved on that?

22 MR. SCHONMAN: I think what we

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1 would prefer is that if you want to reflect it  
2 in your order, that we will discuss with Mr.  
3 Lyon the extent to which we can retain our  
4 existing direct testimony and eliminate those  
5 few portions where he refers to his  
6 professional opinion.

7 ADMIN. JUDGE SIPPEL: Well, okay.  
8 Just in horseback parlance here, you'll  
9 discuss editing out references to professional  
10 opinion or in reference to, in fact,  
11 conclusions based on --

12 MR. SCHONMAN: His expressions of  
13 professional opinion.

14 ADMIN. JUDGE SIPPEL: Okay. I  
15 mean. All right.

16 MR. SCHONMAN: I mean, essentially  
17 what we'll be discussing out of the context of  
18 the admission session is a pre-admission  
19 session which we had not originally  
20 contemplated, but I think for all intents and  
21 purposes that's what Your Honor is proposing  
22 now is that we engage in a pre-admission

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1 session with opposing counsel.

2 ADMIN. JUDGE SIPPEL: Well,  
3 anything that you do on trial preparation  
4 you're going to do with opposing counsel. You  
5 can call it anything you want. Maybe you can  
6 stipulate things on it. I don't care how you  
7 do it. The point is that on the admissions  
8 day I'm hoping that I'm not going to have to  
9 wrestle with a line by line breakdown of his  
10 testimony with respect to whether or not it's  
11 an opinion or not. I'm hoping. And I know  
12 there are going to be certain sentences and  
13 paragraphs where that's going to be  
14 impossible. I'm going to have to. But, you  
15 know, it's all a question of how much time you  
16 spend, you know, working on the transcript and  
17 all.

18 So, I mean, everybody benefits  
19 from shortening these procedures. I think.

20 Okay. Well, so anyway, there's  
21 going to be a discussion outside trying to --  
22 I'll find some very vague way of saying it so

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1 that you're not pinned down. Certainly on  
2 April 7th, Mr. Lyon is going to submit his  
3 proposed rebuttal and possibly with one, two  
4 or three of these named witnesses.

5 Is there anything else?

6 Cross examination by speaker phone  
7 or otherwise.

8 We got Sherman and Dr. -- I'm  
9 sorry.

10 MR. LYON: Dr. Allmon.

11 ADMIN. JUDGE SIPPEL: Dr. Allmon  
12 and who was the other person that's going to  
13 be cross examined? Sherman?

14 MR. LYON: Shilling.

15 ADMIN. JUDGE SIPPEL: Shilling?

16 MR. SCHONMAN: Detective Shilling.

17 ADMIN. JUDGE SIPPEL: Yes.

18 Detective Shilling is going to be here.

19 MR. SCHONMAN: Correct.

20 ADMIN. JUDGE SIPPEL: And Mr.

21 Titus is going to be here. But there was  
22 another witness --

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1 MR. SCHONMAN: Oh, well, Mr.  
2 Sherman.

3 ADMIN. JUDGE SIPPEL: Sherman.

4 MR. KNOWLES-KELLETT: Sherman and  
5 Allmon are the two on cross.

6 ADMIN. JUDGE SIPPEL: That's what  
7 I'm trying, yes.

8 MR. LYON: Shilling and Titus are  
9 the two --

10 ADMIN. JUDGE SIPPEL: That's  
11 exactly. That's what I was saying. Sherman.

12 Okay. All right.

13 Shilling and Titus live, Sherman  
14 and Allmon by speaker phone, cross examine.

15 Well, wait a minute. Now, Dr.  
16 Allmon and Sherman are going to testify by  
17 speaker phone directly. No. I'm sorry. They  
18 already testified with their written  
19 testimony.

20 They are going to be cross  
21 examined or available for cross examine by  
22 speaker phone.

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1 MR. SCHONMAN: Correct.

2 ADMIN. JUDGE SIPPEL: Shilling and  
3 Titus are going to be available in court to be  
4 cross examined.

5 On the 7th we're going to get the  
6 submission of rebuttal. In the meantime  
7 you're out talking on the rebuttal. I'm  
8 sorry, not the rebuttal.

9 MR. SCHONMAN: Detective Shilling  
10 is direct.

11 ADMIN. JUDGE SIPPEL: Yes. The  
12 question of Detective Shilling's direct  
13 testimony.

14 Now, where does that leave us with  
15 respect to -- I conditioned the need for these  
16 bench briefs on the meaning of Rule 26? Can  
17 we put that aside for now? It seems to me  
18 that we can.

19 MR. SCHONMAN: I think we can put  
20 it aside for now.

21 ADMIN. JUDGE SIPPEL: What do you  
22 think --

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1 MR. LYON: I think we can put it  
2 aside if Bureau counsel and I can agree as to  
3 the limits of Mr. Shilling's testimony and  
4 I'll give a good faith attempt to do so. I  
5 just don't think it's likely.

6 ADMIN. JUDGE SIPPEL: Okay.

7 MR. LYON: Because from what Mr.  
8 Schonman is saying, I think, his view of the  
9 expert testimony and Mr. Shilling's exhibit is  
10 substantially narrower than my interpretation  
11 of Mr. Shilling's degree of expert testimony.

12 ADMIN. JUDGE SIPPEL: Well, is  
13 there something definitive that you both could  
14 exchange? Not exchange, rather but that the  
15 Bureau -- could you give them in advance, look  
16 at what it is that you're willing to exclude  
17 by say around April the 1st or so?

18 MR. LYON: If I could suggest,  
19 Your Honor, that we keep the April 1 and April  
20 7 dates with the proviso that if we can agree  
21 as to Shilling's testimony that those briefs  
22 won't be necessary?

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1                   MR. SCHONMAN: Your Honor, it may  
2 come down to the Bureau agreeing to proffer  
3 Detective Shilling as a fact witness who would  
4 testify about his knowledge of the situation  
5 involving Mr. Titus, his experiences, his  
6 background. He can testify about all those  
7 things as a fact witness. What he has done or  
8 what processes he went through. What  
9 processes he's required to go through and  
10 merely omit references to his opinion, in  
11 which case the bench memo regarding Rule 26  
12 would not be necessary.

13                  MR. LYON: Again, I think Mr.  
14 Schonman's statement reflects his narrow view  
15 of the expert nature of Mr. Shilling's  
16 testimony. It doesn't reflect my view which  
17 is essentially that nine out of the 10 pages  
18 amount to expert testimony.

19                  ADMIN. JUDGE SIPPEL: Well,  
20 there's always going to be that disagreement.  
21 I'm seeing that the Bureau has backed off  
22 considerably from its initial decision on this

1 and I don't want to put any party to the task  
2 of, you know, of a bench brief on a point that  
3 it can be very quickly mooted is what I'm  
4 saying. And I don't know whether that's going  
5 to happen or not.

6 MR. LYON: I will undertake to  
7 confer with the Bureau by tomorrow and see if  
8 we can narrow this down, Your Honor.

9 ADMIN. JUDGE SIPPEL: You know --

10 MR. SCHONMAN: Your Honor, you  
11 know, the Bureau is willing to work with Mr.  
12 Lyon on this and I think your assessment is  
13 entirely accurate. We are going to great  
14 lengths to try to streamline this.

15 I will note that Mr. Titus'  
16 counsel, with the exception of Exhibit 1,  
17 Bureau Exhibit 1 which is a copy of Mr. Titus'  
18 license, has objected to every one of our  
19 exhibits. Every one of them.

20 I don't see that as contributing  
21 towards a streamlined process.

22 MR. LYON: Your Honor --

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1                   MR. SCHONMAN: That everyone of  
2                   our exhibits has a problem.

3                   MR. LYON: Your Honor, if counsel  
4                   wants to get into an argument on admissions,  
5                   I'm more than willing to do it. I'm prepared  
6                   to do the entire set of exhibits right now.  
7                   But I don't think that you are --

8                   ADMIN. JUDGE SIPPEL: I'm not.

9                   MR. LYON: And, you know, the  
10                  exhibits are riddled with hearsay and there's  
11                  testimony based on witnesses who haven't been  
12                  tendered. I mean, there's a letter. One of  
13                  the exhibits has a letter to a Congressman or  
14                  to a Senator from a witness who is not even  
15                  tendered here.

16                  What am I supposed to do other  
17                  than to object to that type of hearsay?

18                  ADMIN. JUDGE SIPPEL: Well, to me  
19                  that's a routine objection.

20                  MR. SCHONMAN: It would be if he  
21                  had an understanding of why the letter is  
22                  coming in. And, of course, that's something

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1     *that we can discuss at the admission session.*

2             ADMIN. JUDGE SIPPEL:   Well, you  
3     can make your proffer. But it's not coming in  
4     for the truth that's served therein?

5             MR. SCHONMAN: No, sir. It's not.

6             MR. LYON:   If it doesn't, Your  
7     Honor, then I think that I don't see the  
8     relevance of it. The fact that someone might  
9     have -- if it's coming in for the fact that  
10    there's somebody who is concerned because Mr.  
11    Titus had a sex offense 15 years ago, I don't  
12    think that's probative of the determination  
13    that you have to make. And I can't see any  
14    other purpose for it.

15            MR. SCHONMAN: Your Honor, are we  
16    having the admission session now or not?

17            ADMIN. JUDGE SIPPEL: Well, maybe  
18    there's a quick answer to this.

19            Is there a quick answer to this?

20            MR. SCHONMAN: I don't know if  
21    there's a quick answer to anything but I will  
22    say that it certainly is probative of

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1 someone's state of mind. Of why this case is  
2 even before Your Honor.

3 MR. LYON: Because a senator  
4 complained.

5 ADMIN. JUDGE SIPPEL: Wait a  
6 minute. Wait a minute. Don't get ahead of  
7 me.

8 Whose state of mind, the Bureau's  
9 state of mind? I think that's what I heard  
10 and I think that's right.

11 Let's cool it. Let's cool it. As  
12 cool people say, let's cool it.

13 We're making a lot of progress  
14 actually despite what some may think. We are  
15 making progress. I think we should just leave  
16 it the way it is.

17 But here is what I'm going to do.

18 There's a lot to do on the 7th  
19 already.

20 Why don't we do this. On the 4th  
21 which is a Friday, I won't be here, but it  
22 will be waiting for me when I come back.

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1 I'd like a joint status report on  
2 what's been accomplished between now and then.

3 MR. LYON: That's April 4, Your  
4 Honor?

5 ADMIN. JUDGE SIPPEL: April the  
6 4th. It's a Friday. It's a Friday. The 4th  
7 of April.

8 And the reason I say on the 4th is  
9 -- and certainly if there is any change you  
10 can -- because there's a lot to do on the 7th  
11 with your, you know, proposed rebuttal  
12 testimony and that type of thing. I don't  
13 want to pile up on the 7th.

14 Would you rather do it on the 7th?

15 MR. LYON: The 4th is fine, Your  
16 Honor.

17 ADMIN. JUDGE SIPPEL: Because I  
18 won't be here to read it on the 4th, but at  
19 least it will be here when I get in and it  
20 will help me in terms of deciding whether or  
21 not we need another conference before the  
22 admission session.

1 I'm hoping that this can all be  
2 worked out and I think it can and I understand  
3 the Bureau's position. And you've been very  
4 patient. You've been very patient. And I  
5 certainly -- well, I've expressed myself with  
6 respect to Mr. Lyon's argument on fairness and  
7 so I'm not going to say anything more about  
8 that.

9 Let's see if I can get this order  
10 out in due course and that I cover all the  
11 points.

12 Anything more?

13 From the Bureau?

14 MR. SCHONMAN: No, sir.

15 ADMIN. JUDGE SIPPEL: Mr. Lyon?

16 MR. LYON: No, Your Honor.

17 ADMIN. JUDGE SIPPEL: Okay. Then  
18 we are in recess until 9:30 on the 14th of  
19 April.

20 Thank you very much.

21 (Whereupon, the above matter was  
22 concluded at 10:29 a.m.)

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Name of Hearing

EB DOCKET NO. 07-13

Docket No. (if applicable)

445 12<sup>th</sup> STREET, S.W., WASHINGTON, D.C.

Place of Hearing

March 11, 2008

Date of Hearing

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March 24, 2008

Kevin Connolly

*Kevin Connolly*

Date

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